Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1996

JOHNNY DRUMMOND, JOYCELYN HAGAN, OZINE HAGAN, VANDER J. SAPP, JUANITA CAITON, NATHAN TURNER, ROY JACKSON, JAMES DARBY, JR., FREDDY LAWRENCE, RICHARD ALLEN, JUDY M. DEBOSE, LEROY SMITH, WILBERINE NELSON, AND MARION FRANCIS,
PETITIONERS

v.

TOGO D. WEST,
SECRETARY OF THE UNITED STATES ARMY,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTION PRESENTED FOR REVIEW

1. When does the 90-day period commence to run under 42 U.S.C. 2000e-16 (C) for individuals who did not appear by their attorney in the EEOC proceeding?

PARTIES TO THE PROCEEDING

The following were parties in the courts below: Johnny B. Drummond, Joycelyn Hagan, Ozine Hagan, Vander J. Sapp, Juanita Caiton, Nathan Turner, Roy Jackson, James Darby, Jr., Freddy Lawrence, Richard Allen, Judy M. Debose, Leroy Smith, Wilberine Nelson, Marion Francis, and Togo D. West, Secretary of the United States Army.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOHNNY DRUMMOND, JOYCELYN HAGAN, OZINE HAGAN, VANDER J. SAPP, JUANITA CAITON, NATHAN TURNER, ROY JACKSON, JAMES DARBY, JR., FREDDY LAWRENCE, RICHARD ALLEN, JUDY M. DEBOSE, LEROY SMITH, WILBERINE NELSON, AND MARION FRANCIS,
PETITIONERS

v.

TOGO D. WEST, SECRETARY OF THE UNITED STATES ARMY,
RESPONDENT

PETITION

Johnny B. Drummond, Joycelyn Hagan, Ozine Hagan, Vander J. Sapp, Juanita Caiton, Nathan Turner, Roy Jackson, James Darby, Jr., Freddy Lawrence, Richard Allen, Judy M. Debose, Leroy Smith, Wilberine Nelson, and Marion Francis petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit on May 27, 1996.

OPINION BELOW

The opinion of the court of appeals (95-31265 Pet. App. 1a) is not reported, The opinion of the district court (94-3873-"A" Pet. App. 3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e-16(c.) provides as follows:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section

2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT OF THE CASE

1. Petitioners, Johnny Drummond, et al, are present and former employees of the United States Corps of Engineers. On October 30, 1992, petitioners filed a formal complaint of discrimination against the agency. The agency, on October 5, 1993, issued a final decision rejecting petitioners' complaint. In a decision dated August 29, 1994, the Equal Employment Opportunity Commission affirmed the agency's decision. Petitioners had not appeared by their attorney in the EEOC proceedings although he had been listed as such.

2. Two copies of the decision were mailed to petitioners' counsel's office even though he had not made a formal appearance at any of the EEOC proceedings. It was received and signed for by one Barbara Requa, on August 31, 1994. Ms. Regua is an employee of the law firm of Jernigan and Weiner, with whom petitioners' counsel share office space. She was advised of her responsibilities and duties by Mr. Jernigan. One of her duties consisted of picking up and sorting the mail for the attorneys in the office, of whom there are approximately twenty-two (22).

3. Ms. Regua was neither an employee nor a representative of petitioners' counsel's office, nor was she authorized by him to sign for and/or receive certified mail, particularly the EEOC decision.

4. When the decision was received and signed for by Ms. Regua, petitioners' counsel was out-of-town; he returned to town on September 6, 1994. He became aware of the decision on that date.

5. On June 7, 1995, defendant filed a motion to dismiss or for summary judgment. The district court denied the motion, finding that genuine issues of material fact existed as to whether the EEOC decision was delivered to a representative of petitioners' counsel on August 31, 1994, so as to render plaintiff's suit untimely.

6. On August 18, 1995, defendant renewed its motion to dismiss or, alternatively, for summary judgment. The district court denied defendant's renewed motion, finding that there were no facts from which the court could infer either implied or apparent agency *vis a vis* petitioners' counsel and Ms. Regua.

7. On October 13, 1995, defendant sought reconsideration of the court order denying defendant's motion for summary judgment. The district court vacated its opinion of July 10, 1995, and entered judgment in favor of defendant. Judgment was rendered on November 13, 1995. (Pet. App. 3a)

8. Petitioners filed a timely appeal of the verdict to the United States Court of Appeal for the Fifth Circuit. On appeal, petitioners raised and brief the following issues:

a. Whether Barbara Regua was either an agant or a representative of Ronald L. Wilson, petitioners' counsel, on August 31, 1994, when she received a certified letter addressed to him containing the EEO-OFO'S Final decision?

b. Whether the ninety (90) day period for filing suit in federal court commenced on September 6, 1994, the date on which petitioners' counsel received the final decision?

9. In a decision dated May 27, 1996, the Fifth Circuit, in a per curiam opinion, concluded:

"We have carefully received the briefs, the record excerpts and relevant portions of the record itself. For the reasons stated by the district court in its "Order Granting Motion for Reconsideration" under date of November 18, 1995, we AFFIRM the judgment the judgment entered under date of November 14, 1995, dismissing plaintiffs' claim with prejudice." (Pet. App. 1a)

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided questions of considerable public importance in a manner that expressly conflicts with the decision of this court. The appeals court decision affirming the district court determination that petitioners' complaint was filed outside the applicable limitations period conflicts with jurisprudence in this court, particularly *Irwin v. Veterans Administration,* 111 S.Ct. 453 (1990). There is no basis in the Constitution, legislation or in jurisprudence for the determination that petitioners' complaint was untimely. Accordingly, review by this Court is clearly warranted.

I. The decision rendered by the district court that petitioners' complaint was filed outside the limitations period is infirm. The decision of the Court of Appeal affirming the decision of the district court Conflicts With The Law As Stated By The United States Supreme Court In *Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990).

1. The seminal case respective to this issue is *Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990). In *Irwin*, plaintiff was terminated from his employment with the Veterans Administration. He subsequently filed a complaint with the Equal Employment Opportunity Commission, contending that he was discharged because of this race and physical disability. The EEOC, by letter dated March 19, 1987, dismissed Irwin's complaint. The letter was mailed *both* to Irwin and his attorney, with its arrival at the attorney's office on March 23, 1987. The attorney was out of the country and did not return until April 10, 1987, on which date he discovered the letter. According to Irwin, he did not receive the letter until April 7, 1987.

2. Irwin commenced proceedings in federal court on May 6, 1984, 44 days after receipt of the notice by his attorney's office, but 29 days after he received it. Defendant filed a motion to dismiss, contending that the complaint was not filed within 30 days of receipt of the EEOC decision. On appeal, the Court of Appeals for the Fifth Circuit upheld the decision, holding that the 30 day period commenced on the day that the letter was received by the office of counsel for plaintiff, even if counsel himself did not receive it.

3. This Court granted certiorari to determine when the 30-day period commences to fun under Section 2000e-16(c). This Court, emphasizing the fact that *"[Irwin appeared by his attorney in the EEOC proceeding,"* affirmed the Court of Appeals decision that the time period commenced upon receipt of the letter by the office of Irwin's counsel; if concluded that *"Irwin's complaint was filed untimely." Id.* at 456.

4. In so concluding, the Court rejected Irwin's contention that there is a difference between when notice is received by the attorney himself and when it is received by his office. This Court, in reaching that position, cited circuit court decision which *"held that notice to an attorney's office, which is acknowledged by a representative of that office qualifies as notice to the client." Id.*

5. The case before the Court, though strikingly similar to the facts present in *Irwin,* differs in three (3) very salient aspects. First, notice was received by Barbara Regua, who is neither an employee nor representative of petitioners' counsel, second petitioners had not appeared by their attorney in the EEOC proceedings. Third, for some inexplicable reason, no effort was made to serve a copy of the notice on plaintiff Drummond himself—both were served at the office of petitioners' counsel.

6. Due to the presence of those facts, *Irwin* is clearly distinguishable and, therefore, inapplicable. The ninety-day period began to run on September 16, 1994, the date of petitioners' counsel's return to the office and discovered the determination—not August 31, 1994.

CONCLUSION

The position of the Fifth Circuit affirming the district court's decision that the 90 day period commenced on August 31, 1994, when "the EEOC decision was delivered to counsel's office" conflicts and is at odds with this Court's decision in *Irwin*.

Respectfully submitted:

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August 26, 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Filed
May 27 1996

No. 95-31265
Summary Calendar

JOHNNY DRUMMOND; JOYCELYN HAGAN; MARION FRANCIS; OZINE HAGAN; VANDER J. SAPP; JUANITA CAITON; NATHAN TURNER; ROY JACKSON; JAMES DARBY, JR.; FREDDY LAWRENCE; RICHARD ALLEN; JUDY M. DEBOSE; LEROY SMITH; WILBERINE NELSON,

Plaintiffs-Appellants,

VERSUS

UNITED STATES DEPARTMENT OF THE ARMY, TOGO D. WEST, Secretary,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(94-CV-3873-A)

Before DAVIS, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:*

Johnny B. Drummond, et al. (the plaintiffs) filed this Title VII class action on December 5, 1994, against the defendant, Secretary of the Army. In lieu of an answer, the Secretary of the Army filed a motion to dismiss or for summary judgment because plaintiffs did not file their lawsuit within the requisite time after their attorney received the final decision from the Equal Employment Opportunity Commission - Office of Federal Operations (EEOC — OFO).; The envelope containing this final decision was sent by certified mail and received on August 31, 1994, by an employee of the law firm from whom plaintiffs' counsel rented office space. After receipt, the letter was left in the customary place in the office copy room where plaintiffs' counsel picked up his mail. However, plaintiffs' counsel was out of town and he did not "personally" pick up the certified letter until he returned to his office on September 6, 1994. The district court granted the motion to dismiss of the Secretary of the Army because this suit was not filed within the 90-day period specified by 42 U.S.C. § 2000e-16(c).

We have carefully reviewed the briefs, the record excerpts and relevant portions of the record itself. For the reasons stated by the district court in its "Order Granting Motion for Reconsideration" under date of November 8, 1995,

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* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

we AFFIRM the judgment entered under date of November 14, 1995, dismissing plaintiffs' claims with prejudice.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Nov 13, 1995

JOHNNY B. DRUMMOND ET AL — CIVIL ACTION

VERSUS — NO. 94-3873

TOGO D. WEST, SECRETARY OF THE DEPARTMENT OF THE ARMY — SECTION "A"

JUDGMENT

Considering the written Order of the Court on file, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendant Togo D. West, Secretary of the Department of the Army and against plaintiffs, Johnny B. Drummond, Joycelyn Hagan, Ozine Hagan, Marion Francis, Ozine Hagan, Vander J. Sapp, Juanita Caiton, Nathan Turner, Roy Jackson, James Darby, Jr., Freddy Lawrence, Richard Allen, Judy M. Debose, Leroy Smith and Wilberine Nelson, dismissing plaintiffs claims with prejudice, plaintiffs' to bear all costs.

New Orleans, Louisiana, this 13th day of November, 1995.

LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

By: /s/ Denny P. Descant
Denny P. Descant
Chief Deputy Clerk

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY NOV 14 1955

APPENDIX C

MINUTE ENTRY
SCHWARTZ, J.
NOVEMBER 7, 1995

Filed
Nov 8, 1995

JOHNNY B. DRUMMOND ET AL	CIVIL ACTION
VERSUS	NO. 94-3873
TOGO D. WEST, SECRETARY OF THE DEPARTMENT OF THE ARMY	SECTION "A"

ORDER GRANTING MOTION FOR RECONSIDERATION

This matter is before the Court on defendant Togo D. West, Secretary of the Department of the Army's Motion for Reconsideration of this Court's July 10, 1995 order denying defendant's motion for summary judgment. The motion was set for hearing on November 1, 1995, but was submitted on the briefs. For the reasons stated herein, the Court hereby **VACATES** its July 10, 1995 order and **GRANTS** summary judgment in favor of the defendant.

I. BACKGROUND

The following facts are undisputed and established by the affidavit of plaintiff's counsel and the deposition of Barbara Regua. On August 29, 1994, the Equal Employment Opportunity Commission (EEOC) affirmed the defendant's

DATE OF ENTRY NOV 8 1995

federal agency decision dismissing plaintiff's class action discrimination complaint. The EEOC mailed its decision on the same day to the address designated by the plaintiff as the office of his attorney. The notice was actually received at counsel's office on August 31, 1994 by Barbara Regua, an employee of a law firm with whom plaintiff's counsel shares office space. Regua left the EEOC decision, together with counsel's other mail, in a copy room where incoming mail was customarily picked up by counsel or a member of his staff. However, plaintiff's counsel was out of town at the time and did not actually see the decision until he returned to his office on September 6, 1994. Plaintiff filed suit in this Court on December 5, 1994, 96 days after the day that the EEOC decision was delivered to counsel's office.

II. DISCUSSION

On June 21, 1995, defendant moved for summary judgment on the ground that plaintiff failed to file his complaint within the 90 days specified in 42 U.S.C. § 2000e. In its motion, defendant argued that the 90-day filing period commenced on August 31, 1994, the day that the EEOC decision was delivered to the office of plaintiff's attorney. The Court denied defendant's motion in a written opinion issued on July 10, 1995. In its decision, the Court held that the statutory filing period for plaintiff's complaint would have commenced on August 31, 1994, only if Barbara Regua had been authorized to accept mail on behalf of plaintiff's counsel. The Court further held that a disputed issue of fact existed as to whether Barbara Regua was authorized to accept mail on plaintiff's counsel's behalf. In its motion for reconsideration, defendant argues that the Court's decision is inconsistent with the Fifth Circuit's decision in *Espinoza v. Missouri Pacific R.R.*, 754

F.2d 1247 (5th Cir. 1985).

In *Espinoza,* the EEOC mailed a right-to-sue letter to Espinoza's mailing address. The notice was actually received by Espinoza's wife and Espinoza, who was out of town, did not receive the letter until he returned home. Espinoza filed his complaint 92 days after the letter was delivered to his home. The district court held that the 90-day filing period was triggered by the receipt of the letter at Espinoza's residence and that Espinoza's suit was therefore untimely. The Fifth Circuit affirmed. In so doing, the Court held that "the giving of notice to the claimant at the address designated by him suffices to start the ninety-day period unless, the claimant, through no fault of his own, failed to receive the right-to-sue letter or unless, for some other equitable reason, the statute should be tolled until he actually received notice." *Id.* at 1250. The Fifth Circuit further held that the equities did not demand tolling simply because Espinoza was out of town when the notice arrived at his home.

While *Espinoza* involved the delivery of an EEOC decision to a claimant's residence, the Court finds that the decision is equally applicable to the facts in this case. There is no material difference between receipt by a claimant and receipt by formally designated counsel or his office. *Ringgold v. National Maintenance Corp.,* 796 F.2d 769, 770 (5th Cir. 1986). Plaintiff argues that under *Irwin v. Department of Veteran Affairs,* 498 U.S. 89, 111 S.Ct. 453 (1990), actual notice is "received" at an attorney's office only when the notice is acknowledged by a representative of that office. *Irwin* imposes no such requirement. To the contrary, the Supreme Court specifically adopted the Fifth Circuit's bright line rule that the 90-day period of limitation established by

42 U.S.C. § 2000e is triggered by delivery to the office of formally designated counsel. *Id.* at 93, 111 S.Ct. at 456 (citing *Ringgold v. National Maintenance Corp.*, 796 F.2d 769 (5th Cir. 1986)). Moreover, the court warned that the "practical effect of a contrary rule would be to encourage factual disputes when actual notice was received, and thereby create uncertainty in an area of the law where certainty is much desired." *Id.*

In this case, it is undisputed that the EEOC decision was delivered to counsels office on August 31, 1994 and that the complaint was not filed within 90 days of that date. Plaintiff's complaint was therefore filed outside the applicable limitations period. While the failure to strictly comply with § 2000e's filing deadline may be excused under equitable tolling principles, neither plaintiff nor plaintiffs counsel allege that circumstances beyond their control prevented them from learning of the EEOC's decision within the statuory filing period. Nor has plaintiff's counsel offered an explanation as to why he failed to file suit within the 84 days that remained following his return from vacation. As such, the equitable circumstances of the case cannot excuse plaintiff's failure to follow the procedural requirements of § 2000e. Accordingly,

IT IS ORDERED that the Court's opinion of July 10, 1995 is hereby **VACATED.**

IT IS FURTHER ORDERED that summary judgment is hereby **granted** in favor of the defendant.

The clerk of Court is directed to enter judgment in accordance herewith.

/s/ Illegible